



Comptroller General
of the United States

Washington, D.C. 20548

105298

Decision

Matter of: Johnson Technology--Claim for Costs

File: B-252595.3

Date: August 9, 1993

Paul J. Seidman, Esq., and Robert D. Banfield, Esq., Seidman & Associates, for the protester,
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency,
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The authority of the General Accounting Office to impose appropriate sanctions on the contracting agency for failing to furnish a complete agency report in response to a bid protest does not permit the award of protest costs, which are only authorized where the protest supports a finding that a procurement statute or regulation was violated.

DECISION

Johnson Technology requests that our Office declare it entitled to recover the costs of filing and pursuing its protest, filed in connection with request for proposals (RFP) No. F34601-93-R-0067, issued by the Department of the Air Force, for 4,000 nozzle segments for aircraft engines.

We deny the claim.

On March 8, 1993, 1 day before proposals were due under the subject RFP, Johnson filed a General Accounting Office (GAO) protest challenging the RFP's delivery schedule as unnecessarily restrictive. Johnson then submitted a proposal that departed from this delivery schedule to permit the firm to offer a competitive price. Award was to be made under the RFP to the low-priced, technically acceptable offeror.

On April 14, the Air Force furnished an agency report, including some relevant documents, that addressed the alleged restrictiveness of the RFP's delivery schedule, but did not disclose the results of the competition. The

protester received these documents and a variety of supplemental documentation that it requested under a protective order, to which its counsel and an expert consultant were admitted. The protester submitted comments on the agency report on May 10. On May 14, the Air Force notified the protester that award had been made to General Electric Co. at a unit price lower than that offered in Johnson's proposal. Johnson then promptly withdrew its protest and filed this claim.

Johnson claims that it should recover its protest costs because the Air Force withheld an allegedly relevant document--the abstract of offers showing Johnson to be other than the low offeror--from the agency report in contradiction of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(b), and our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1993), which require an agency to provide all relevant documents with the agency report. As Johnson observes, the Bid Protest Regulations permit GAO to take any of several actions in response to an agency's failure to produce relevant documents, including drawing an unfavorable inference, disallowing responses to certain arguments or imposing other appropriate sanctions. 4 C.F.R. § 21.3(i). Johnson asserts that this provision authorizes the award of protest costs as an appropriate sanction to reprimand an agency for withholding relevant documents. Johnson claims that such sanction is appropriate in this case since the Air Force's exclusion of the abstract of offers caused the protester to incur considerable, unnecessary expenses in employing an expert, obtaining additional documents from the Air Force and preparing comments on the agency report. In this regard, Johnson states that it pursued the protest in good faith, believing that it offered the lowest price, and promptly withdrew the protest when it learned otherwise.

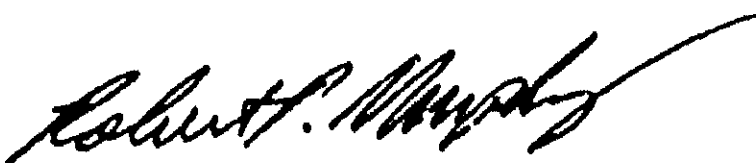
GAO's authority to declare entitlement to protest costs derives from CICA and extends to parties whose protests to our Office support a finding that a procurement statute or regulation was violated. 31 U.S.C. § 3554(c)(1). We implement this statutory authority through our Bid Protest Regulations at 4 C.F.R. §§ 21.6(d), (e), which provide for the possibility of an award of costs where we determine that a procurement action does not comply with statute or regulation, or where an agency takes corrective action in response to a clearly meritorious protest. The underlying purpose of CICA's provisions relating to the award of bid protest costs is to relieve a protester of the financial burden of acting as a private attorney general, where it brings to light an agency's failure to conduct a procurement

in accordance with law and regulation. Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257.

Neither CICA nor our Regulations authorize the award of protest costs to redress an agency's bad faith or inadvertence during the bid protest process, as urged by Johnson. The regulation cited by Johnson, 4 C.F.R. § 21.3(i), does not mention the award of protest costs, but lists a variety of procedural remedies to address an agency's failure to provide a complete agency report. The administrative sanctions listed in 4 C.F.R. § 21.3(i) implement our authority under CICA to impose administrative requirements that are necessary for the prompt and effective resolution of protests--authority which we do not believe extended to the imposition of monetary sanctions. See Independent Metal Strap Co., Inc., B-240033.3, Dec. 12, 1990, 90-2 CPD ¶ 481.

In sum, although the agency should have earlier apprised Johnson of its status as other than the low offeror, especially since this apparently resulted in the withdrawal of Johnson's protest, we have no basis to award protest costs as a penal sanction. See Data Mgmt. Servs., Inc., B-233345.2, Mar. 1, 1989, 89-1 CPD ¶ 214.

The claim is denied.


James F. Hinchman
General Counsel